3. The Eccentric Predictive Models Proposed by the Satellite Industry Would be Completely Irrelevant in Court

As a substitute for the Commission's established and empirically tested predictive model, EchoStar has invited the Commission to "presume" that anyone outside of an artificially shrunken predicted signal area for a TV station -- using 99% (or perhaps 95%) inputs to Longley-Rice -- cannot receive a signal of Grade B intensity from that station. EchoStar Reply at 7-14 (99% inputs); see EchoStar Denver Complaint, ¶ 83 (95%/95%/50% inputs).[21] For the reasons discussed below, such a presumption would be irrational even if the Commission had authority to adopt it -- which it does not.[22]

In enacting the SHVA a decade ago, Congress chose to make each household's eligibility to receive network signals by satellite depend on whether that particular household can receive a signal of Grade B intensity from a local station. 17 U.S.C. § 119(d)(10)(A). And in 1994, Congress strengthened the protection of broadcasters under the SHVA by expressly imposing on satellite carriers the burden of proving that each of their customers does not receive a signal of Grade B intensity. Thus, satellite carriers such as PrimeTime 24 and EchoStar must,

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[21] The NAB concurs in the views of the Network Affiliated Association Alliance that there is no reason to cut off Longley-Rice propagation predictions at the traditional Grade B contour: if the terrain is particularly favorable, stations should get the benefit of that fact, just as they suffer reduced coverage areas (as compared to traditional Grade B contours) from unfavorable terrain.

[22] Use of "99%" factors is also improper for an entirely separate technical reason: engineers generally do not use extremely high location and time factors in applying Longley-Rice because those extreme factors distort prediction results. See Cohen Eng. Statement, ¶ 38; Supplemental Report of Jules Cohen, ¶ 12 n.4 (May 29, 1998). At variabilities above 90% and below 10%, the "log normal" distribution of variabilities breaks down.

by statute, prove that each of their customers cannot receive a signal of Grade B intensity -- which, in a civil lawsuit, means that they must prove it is more likely than not that each customer cannot receive such a signal.

The question of how satellite carriers can meet their statutory burden of proof has already been resolved: a carrier can meet that burden only by conducting a signal intensity test. See ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d at 473-74. But even if (contrary to fact) satellite carriers could meet their burden of proof by other means, the presumption EchoStar invites the Commission to adopt would be irrational.

As one of EchoStar's own cases explains, an agency may adopt a factual presumption of the type advocated by EchoStar only when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it.'" Chemical Mfrs. Ass'n v. Department of Transp., 105 F.3d 702, 705 (D.C. Cir. 1997) (emphasis added). At a minimum, for a presumption about "Grade B intensity" to have any application in civil litigation under the Copyright Act, the presumption would need to be based on sound factual grounds for concluding it is more likely than not that the customer in question cannot receive a signal of Grade B intensity. The presumption advocated by EchoStar falls astronomically short of that standard.

The folly of the EchoStar proposal can be simply illustrated: under the "99%" standard that EchoStar advocates, a household would be presumed to be unable to receive a signal of Grade B intensity *even if there is only a 1.001% probability that the household cannot*

receive such a signal. Such an absurd "presumption" could not possibly withstand judicial review. See Chemical Mfrs. Ass'n, 105 F.3d at 705 (agency factual presumption can stand only if there is a "sound and rational connection" between the "proved" facts and the "inferred" facts). Seen from the other direction, it would be preposterous to presume that a household cannot receive a Grade B intensity signal when it is 98.99% likely to receive such a signal. Adoption of the EchoStar "99%" proposal -- or any proposal requiring use of percentages above 50% -- would therefore be indefensible. See United Scenic Artists, Local 829 v. NLRB, 762 F.2d 1027, 1035 (D.C. Cir. 1985) (rejecting irrational presumption adopted by agency, in which proposed "conclusion . . . simply does not follow from the premise"). Any agency effort to alter the results of civil litigation by such a flawed presumption is doomed.[23/]

Even less defensible is EchoStar's apparent suggestion that the FCC could adopt an *irrebuttable* presumption to the same effect. See EchoStar Reply at 7-8 (discussing irrebuttable presumptions). As EchoStar itself has repeatedly acknowledged, the statutory test with respect to each household is whether "*that particular* household can receive an over-the-air signal of [Grade B] intensity from the local network affiliate." EchoStar Pet. at 2. An irrebuttable presumption would mean that a household is conclusively presumed not to be able to receive a signal of Grade B intensity even if a test shows that the household in fact receives a signal far stronger than Grade B intensity.[24/] Only Congress, and not the Commission, has the

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[23/] See Chemical Mfrs. Ass'n, 105 F.3d at 707 (noting that agency presumption could not apply to civil litigation in light of contrary federal statute applicable to court cases).

[24/] EchoStar's petition invites the Commission to do precisely what the courts have forbidden agencies to do: establish presumptions based not on a "sound and rational connection"

power to rewrite a federal statute to achieve the diametric opposite of the result specified by Congress.

If a Court were to make the mistake of using a gross underpredictor such as EchoStar's jury-rigged version of Longley-Rice, the result would be to create another round of disappointed public expectations. That is, if satellite carriers could sign up ineligible subscribers using a flawed map, stations would be likely to conduct tests -- at the satellite carrier's expense -- to win back the massive numbers of subscribers who are in fact ineligible to receive network stations by satellite. That, of course, would generate another needless round of subscriber complaints about taking away an illegal service to which they had grown accustomed. Such a costly and painful way of working backwards to the correct result would scarcely be in the public interest.

C. Methods of Measuring Grade B Intensity

Although only the courts can decide whether a satellite company has met its burden of proof under the Copyright Act, the Commission has the power to make suggestions to Congress or the courts about appropriate methods for determining ambient signal intensity at a particular household. For the Commission to have an influence in court, any recommendations it

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between the "proved" facts and the "inferred" facts, but on the agency's own view about policy matters. See Chemical Mfrs. Ass'n, 105 F.3d at 705 ("unlike a legislative body, which is free to adopt presumptions for policy reasons, an agency may only establish a presumption if there is a sound and rational connection between the proved and inferred facts."); United Scenic Artists, 762 F.2d at 1034 (an agency may not "creat[e] a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found").

makes must be consistent with the statutory language. We set forth below a package of principles that broadcasters and several satellite carriers have already agreed to that is designed to lower testing costs. The proposals made by EchoStar, PrimeTime 24, and NRTC in this proceeding, however, far from being consistent with the text of the SHVA, are simply designed to subvert the statute.

1. Broadcasters and Satellite Companies Have Already Agreed on a Lower-Cost Way of Measuring Signal Intensity

The Commission has a long-standing set of procedures for measuring signal intensity, 47 C.F.R. § 73.686, which the CBS court has relied on as an appropriate method for measuring signal intensity for SHVA purposes. As Jules Cohen has explained in his CBS Expert Report (¶ 31), the measurement method used by the plaintiffs and the Court in the CBS case is actually) more conservative than the FCC's standard method. As a scientific matter, these procedures are better than any practical alternative; for example, a 100-foot run on the street directly in front of a residence provides reliable information about ambient signal intensity in the area, including the area above the household's rooftop -- and gathers as much as 200 times as much data as a cluster of measurements in the household's driveway. Id. ¶ 30.

Nevertheless, in the interests of reducing measurement costs, broadcasters have already reached agreement with two major satellite companies about an alternative method of measuring signal intensity, in which five measurements are taken in a cluster in the home's driveway. See Broadcaster/Primestar/Netlink Agreement (on file with FCC). The key elements of that agreement are as follows:

Location: in driveway or otherwise close to home

Number of measurements: five; median is key measurement

Antenna height: 20 feet for one-story homes; 30 feet for two-story or higher homes

Equipment: Standardized, calibrated equipment (Channel Master Model 3016 with 50 feet of RG/6U cable)

Orientation of antenna: to obtain strongest signal from station

Notice: 45 days advance notice to opposing party

Costs: to encourage all parties to be reasonable and to try to minimize testing, the "loser" must pay the testing costs, which are capped at $150.[25/]

2. The EchoStar/PrimeTime 24/NRTC Measurement Proposals Are Illogical and Completely Inconsistent with the Statute

EchoStar, PrimeTime 24, and NRTC have suggested a variety of unscientific procedures for measuring signal intensity at individual homes. The only consistent theme in this confusing medley of proposals is the desire to find some way to claim that served households are actually unserved. Because these proposals have no bearing on the dispositive statutory issue --

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[25/] Although the "loser pays" provision is sensible as a policy matter, we respectfully suggest that the Commission could not impose such a provision by regulation. Under the SHVA as now in force, the "loser pays" rule is applicable in civil litigation, but not otherwise. See 17 U.S.C. § 119(a)(9).

whether a household "cannot receive" a signal of Grade B intensity -- the FCC obviously should not endorse them.

We review here the principal devices that EchoStar, PrimeTime 24, and NRTC have proposed to try to inflate their customer base by depressing signal intensity measurements:

a. Use of Unknown / Defective Equipment

Satellite companies have sometimes suggested doing measurements with a household's own unknown, and potentially defective, equipment. As all competent engineers (whether working for broadcasters or satellite companies) recognize, however, it is impossible to determine signal intensity unless one knows all of the pertinent characteristics of the antenna, transmission line, and measuring device being used.[26/] Strikingly, in its complaint filed in federal court in Colorado, EchoStar itself has recognized the inappropriateness of doing measurements using a household's own equipment, and proposed instead that standardized equipment be used

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[26/] E.g., CBS v. PrimeTime 24, Trial Tr. 200:12-15 (Cohen) (inside voltage measurements with unknown equipment do not shed any light on actual signal intensity above the roof); Supplemental Expert Report of Jules Cohen, at ¶ 47 (same); Trial Tr. 686:23-687:19 (PrimeTime 24 expert Robert Culver); id. at 696:2-11 (even with very low voltage measured using homeowner's own equipment, PrimeTime 24 engineer not prepared to testify that signal intensity in the air is below Grade B); id. at 698:21-22 ("I cannot calculate the signal level in the air [above] the house from the indoor voltage measurements."); id. at 689:3-4 (Culver had "never measured field intensity with antennas of unknown characteristics"); id. at 700:13-23 (Culver not prepared to testify about signal intensity at any household at which he used homeowner's own equipment); PX 566, Tr. at 63-65 (PrimeTime 24 expert Richard Biby) (impossible to use unknown equipment to measure signal intensity); id. at 18-19 (describing proper procedure for measuring signal intensity, which requires use of "a receiving antenna of known characteristics"); id. at 69 (measurement at the bottom of old rooftop antenna at residence would say "very little if anything" about the signal intensity above the rooftop).

outdoors. See Complaint, EchoStar Communications Corp. v. CBS Broadcasting, Inc., Civ. No. 98-N-2285 (D. Colo. 1998).

b. Pointing the Antenna the Wrong Way

EchoStar contends that the test antenna should be pointed in whatever direction is specified by the household as the direction of the station the household watches the most. The Commission should reject this suggestion, which is inconsistent with determining whether a household "cannot" receive a signal of Grade B intensity -- and would be a flagrant invitation to abuse as a practical matter.[27]

First, measuring signal intensity with the antenna misoriented sheds no light on whether a household can receive a signal of Grade B intensity. The Commission's standard measurement procedures in 47 C.F.R. § 73.686 have for decades required that the receiving antenna be oriented properly, as does the agreement among broadcasters, Primestar, and Netlink.[28]

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[27] The Commission asks whether there have been relevant changes in what constitutes a "conventional outdoor rooftop receiving antenna." NPRM ¶ 27. The short answer is that because the statute makes eligibility depend on ambient field strength, the only relevant feature of the receiving antenna is its location and orientation. (In conducting measurements, it is standard practice to calibrate whatever antenna is being used against a standard dipole.) A "conventional outdoor rooftop receiving antenna" -- unlike a conventional set-top antenna, or an unconventional rooftop antenna (e.g., one on a lofty tower) -- will be located perhaps 5-10 feet above the household's rooftop.

[28] For a household that wishes to use a single antenna to receive several stations located in different directions, rotors are inexpensive and readily available. See Radio Shack, 1999 Answers Catalog at 156. In markets with dispersed towers, "combination" antennas are commonly available.

The Commission itself has recently recognized, in a highly analogous context, the importance of proper orientation. In a recent decision relating to the FCC's Over-the-Air Reception Device ("OTARD") regulations, the Cable Services Bureau, and then the Commission, considered a series of tests done at the homes of individual viewers in Potomac, Maryland. See In Re Lubliner, 13 F.C.C. Rcd. 4834 (Cable Services Bureau, released Oct. 14, 1997), application for review denied, FCC 98-201 (released Aug. 21, 1998). In that matter, as here, the issue was the strength of signal available to particular homes.[29] The Bureau rejected signal intensity test results where "it is unclear whether [respondent] correctly oriented or positioned the equipment used to gather the data or whether it was positioned in a manner to receive the strongest signal possible (i.e., positioned to achieve maximum gain for each tested signal. . . . Thus, we find that we cannot rely upon the data presented . . . ." 13 F.C.C. Rcd.¶ 20 (emphasis added). In upholding the Cable Services Bureau, the Commission observed that "th[e] requirement to orient toward the strongest signal available guards against an improper signal strength test in which the antennna is oriented (intentionally or inadvertently) in the worst possible direction for receiving the signal, thus giving a misleading result." FCC 98-201, at n.43 (emphasis added).[30]

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[29] In the Lubliner decision, the Commission discussed the possibility of measuring signal strength in an attic. As Jules Cohen explains: "unlike in the [OTARD] case, the [SHVA] is explicitly conditioned on the signal strength available to an outdoor rooftop antenna. In the SHVA context, therefore, measurements in an attic would not be appropriate, although they may in some circumstances be sensible in the OTARD context." Cohen Eng. Statement, ¶ 20 n.10.

[30] Engineers retained by the satellite industry acknowledge the same point: "...I think it reasonable for [the station] to expect homeowners to orient their antennas properly." See Cohen Eng. Statement, ¶ 21 (quoting senior engineer at firm retained by PrimeTime 24).

c. Dividing the Signal Several Times Before Measuring It

EchoStar also makes the absurd proposal that before measuring the strength of a particular station's signal at a particular household, it should be "split" two, three, or more times -- depending on how many televisions the household claims to have. That proposal flies in the face of the Act, which makes a household "unserved" only if it "cannot receive" a signal of Grade B intensity (i.e., a certain number of dBu's) with a conventional rooftop antenna. 17 U.S.C. § 119(d)(10). That is, the crucial issue is the ambient field strength in dBu's in the vicinity above the rooftop. See ABC, 17 F. Supp.2d at 472; CBS, 9 F. Supp.2d at 1340. If the requisite field strength (in dBu's) is present above the rooftop, the household is not "unserved," even if the household were to make the unwise decision to split the signal from a single antenna many times without taking compensating steps such as use of a preamplifier. See Cohen Eng. Statement, ¶ 22-23. Indeed, using standard measurement practices, if a measurement were taken from a "split" signal, the effect of the splitting would need to be "backed out" in order to use the measured voltage to calculate ambient field intensity in dBu's. Cohen Eng. Statement ¶ 23 & n.14.

The "splitting" proposal is also an open invitation to game-playing, as EchoStar obviously intends. Satellite customers who have for years been claiming to get "unacceptable pictures" in order to sign up for satellite network service will quickly learn that they should claim to use many splitters (and not to use any pre-amplifiers) in order to obtain a weaker signal strength measurement. There would be no practical way to check on such claims.

The splitting proposal would also yield absurd results: a household with a certain ambient field intensity would be treated as served (i.e., ineligible for satellite network service) because it had only one TV set, but a house next door would be treated as unserved because it had three. And the eligibility of any given household would vary over time, depending on how many splitters the household claimed to use at any given moment. Congress cannot have intended such nonsensical results.

d. Treating a Household as Eligible If a Single Measurement Falls Below Grade B intensity

As part of its consistent effort to find some way to gut the restrictions imposed by Congress, EchoStar contends that a household should be considered "unserved" if signal intensity falls below Grade B intensity for even an instant. EchoStar Pet. at 23-26. That proposal, too, would be inconsistent both with the Act and with common sense. The Act makes eligibility depend on the presence of a signal of Grade B intensity, which is defined as a median signal of a specified number of dBu's. A momentary dip below, say, 47 dBu's, simply does not make a household "unserved" under the statutory definition. (Indeed, the Commission built an extra 6 dBu into the definition of Grade B intensity to deal with time variability: the actual signal strength that the Commission believed was needed for an acceptable picture was 41 dBu's. See NPRM ¶ 4 n.16.)

V. THE LOCAL-TO-LOCAL SOLUTION IS MORE PROMISING THAN EVER

If Congress creates an appropriate statutory and regulatory regime, satellite companies will be able to compete with cable systems by offering local broadcast stations -- not distant ones -- to local viewers, just as cable systems do. (This option is in addition to the strategy now being successfully pursued by DirecTV, and discussed further below: to provide customers with over-the-air antennas as well as dishes.) The local-to-local solution, if properly implemented, is a win/win situation for satellite companies, broadcasters, and consumers. We urge the Commission to lend its strong support to adoption of an appropriate local-to-local regime.

Capitol Broadcasting has a detailed plan for providing local-to-local service to every market in the United States. See Satellite Start-Up Sees Its Niche, Raleigh News-Observer (Dec. 9, 1998). Prospects for a successful local-to-local solution have also been brightened by EchoStar's recent announcement that it is acquiring a vast amount of new satellite capacity. With hundreds of new channels at its disposal, EchoStar could offer local-to-local service to a large percentage of American television households.

For the Commission's benefit, we attach as Exhibit D a copy of a resolution recently approved by the NAB Television Board endorsing an appropriate regulatory and statutory regime for local-to-local.

VI. Preventing Duplication of Network Programming Is Vital to Preservation of the Network/Affiliate System and Free, Over-the-Air Broadcasting

There is nothing new about the policy behind the "unserved household" limitation in the SHVA. That limitation simply implements a longstanding federal policy: to protect local network stations -- which provide free television and local news to virtually all Americans -- against importation of duplicative network programming. As a matter of sound public policy, it is essential to retain strong and enforceable protections against such duplication, whether by cable systems, open video systems, satellite companies, or any other retransmission system.

As the NPRM describes, the principle of localism has long been of central importance in the regulation of over-the-air broadcasting and of media that carry the signals of over-the-air stations. For example, in its NPRM (¶ 3), the Commission points out that in enacting the SHVA,

> Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (*e.g.*, local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast

networks, might be jeopardized, thus undermining one important source of local information.

Thanks to the vigilance of Congress and the Commission over the past 50 years, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Victoria, Texas (with only 28,000 television households), Alpena, Michigan (with only 17,000 television households), and Glendive, Montana (with only 5,000 television households).

Congress has long directed the Commission to promote "localism" in the broadcast industry "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); see United States v. Southwestern Cable Co., 392 U.S. 157, 174 & n.39 (1968) (same). That policy has provided crucial public interest benefits. Only last year, the Supreme Court declared that

> Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.

Turner Broadcasting Sys. v. FCC, 117 S. Ct. 1174, 1188 (1997).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by

network affiliated stations is, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments by the viewer. See Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); Communications Act of 1934 § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, "nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming." Turner I, 512 U.S. at 663.

The network/affiliate system provides a service that is very different from nonbroadcast networks. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. H.R. Rep. 100-887, pt. 2, at 19-20 (1988) (describing network/affiliate system, and concluding that "historically and currently the network-affiliate partnership serves the broad public interest.") Unlike nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network station provides a customized blend of programming suited to its community -- in the Supreme Court's words, a "local voice." For example, stations in North Carolina provide vitally needed information to viewers about potential hurricanes, while stations in Montana do the same about impending blizzards. Similarly, during the summer of 1998, stations in Florida have provided a tremendous public service by tracking and providing constant coverage of the disastrous spread of fires in that state.

A key source of revenues for local network affiliates is the sale of local advertising time during network programs. Because network programs often command large audiences, the sale of local advertising slots during these programs is one of the most important ways in which stations earn revenues to stay in business and fund their local news, weather, and public affairs programming.

Networks and their local affiliates also cooperate in a wide variety of other ways to encourage "audience flow" and to promote one another's programming. For example, networks often provide their affiliates with the opportunity, during their 10-11 p.m. programs, to offer a "local news tease" promoting that day's 11 p.m. local news program. These various forms of cooperation can succeed, however, only if viewers are watching their own local stations.

A variety of technologies have been developed or planned -- including cable, satellite, and open video systems ("OVS") -- that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the Commission (or both) has acted to ensure that the retransmission system does not import duplicative network programming from distant markets.

In the case of cable television, for example, the Commission has since the mid-1960's imposed "network nonduplication" rules on cable systems. 47 C.F.R. §§ 76.92-76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

> [I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.

Report and Order, In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, ¶ 117, 3 FCC Rcd. 5299, 5319 (released July 15, 1988), aff'd, 890 F.2d 1173 (D.C. Cir. 1989); see also Southwestern Cable Co., 392 U.S. at 165; Wheeling Antenna Co. v. WTRF-TV, Inc., 391 F.2d 179, 183 (4th Cir. 1968). Similarly, when considering the possible entry by telephone companies into the multichannel video business through open video systems, Congress in 1996 specifically directed the FCC to apply its program exclusivity rules, including its network nonduplication, syndicated exclusivity, and sports blackout rules, to OVS operators. Telecommunications Act of 1996, Pub. L. 104-104, § 653(b)(1)(D).

VIII. The Satellite Industry Has Grossly Abused the Compulsory License

For ten years, the satellite industry has consciously and lawlessly abused the narrow compulsory license granted by the SHVA. The satellite industry abuse started in 1988, just after Congress expressly rejected satellite industry proposals to make eligibility depend on

self-reporting about picture quality, and instead adopted a completely objective, signal intensity standard. Rather than complying with the law, the satellite industry ignored the statute, and instead employed the same sham standard ("do you get an acceptable picture") that Congress had condemned. By using that improper standard, satellite companies signed up enormous numbers of unlawful subscribers, many in urban and suburban areas in which there can be no doubt that subscribers receive Grade B -- and often Grade A -- intensity signals.

The vast scale of these violations can be illustrated in two different ways. First, broadcasters have carried out signal intensity tests -- following the procedures specified by the Commission in 47 C.F.R. § 73.686 -- at the locations of more than 500 randomly selected PrimeTime 24 subscribers in five markets. The results of these tests are described in the Expert Report of Jules Cohen, copies of which have been previously provided to the Commission. Mr. Cohen supervised signal intensity tests at approximately 100 randomly selected locations in each of five markets: Miami, Florida; Charlotte, North Carolina; Pittsburgh, Pennsylvania; Baltimore, Maryland; and Raleigh, North Carolina. The percentages of these randomly selected subscribers who received a signal of at least Grade B intensity were as follows:

Miami:	**100%**
Charlotte:	**98%**
Pittsburgh:	**59%**
Baltimore:	**91%**
Raleigh:	**95%**[31/]

31/ As Jules Cohen explains, the Pittsburgh data represents not a typical case but an extreme worst case: a high-band UHF station (Channel 53) operating in perhaps the most difficult terrain

In other words, random testing of PrimeTime 24 subscribers in five different markets showed that the overwhelming majority could easily receive a signal of Grade B intensity from their local stations. In fact, most could receive a signal of *Grade A* intensity. See Expert Report of Jules Cohen.

Second, Mr. Cohen has supervised the creation of Longley-Rice propagation maps -- which take into account the detailed terrain surrounding a broadcast tower -- and used "geocoding" to plot the locations of PrimeTime 24 subscribers on the same maps. These maps have been created using the standard parameters specified by the FCC in OET Bulletin 69. Mr. Cohen's Expert Report contains such maps for more than 40 representative television stations. These maps show that satellite carriers are routinely signing up large numbers of subscribers not in remote rural areas, but in urban and suburban areas that are obviously served by their local station's over-the-air signals. In the Washington area, for example, PrimeTime 24 has signed up thousands of subscribers in the District of Columbia and the innermost Maryland and Virginia suburbs. As Mr. Cohen's maps show, this same pattern of abuse by PrimeTime 24 is uniformly replicated in television markets, large and small, across the United States.

The infringements being committed by satellite carriers are having their greatest impact on network stations that serve viewers in rural areas. In the Missoula, Montana DMA, for

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of any station in the United States. See Expert Report of Jules Cohen, ¶ 26. PrimeTime 24 itself has endorsed Charlotte as a much more typical market, see id. at ¶ 25. In that market, 98% of PrimeTime 24's randomly selected subscribers were measured to receive a signal of Grade B intensity.

example, imported CBS stations from Erie, Pennsylvania, Denver, Colorado, and San Francisco, California achieved Nielsen ratings 15% of those of the local CBS station during the February 1998 sweeps period -- in part through "scooping" the local CBS station by offering Olympics coverage at an earlier time from East Coast CBS stations. See Nielsen Station Index, DMA Total Activity Report 542-43 (1998). In Missoula, as in every other market, the great majority of satellite subscribers are being served unlawfully.

After years of trying to obtain compliance through negotiations, broadcasters were finally forced to sue the largest providers of distant network signals, PrimeTime 24, which sold ABC, CBS, Fox, and NBC programming through DirecTV, EchoStar, and many other distributors.[32/] Two courts have now condemned the lawless pattern of infringements in which PrimeTime 24 and its distributors (including DirecTV, NRTC, and EchoStar) have engaged.

First, the United States District Court for the Southern District of Florida has determined, in granting plaintiffs' motion for a preliminary injunction, that PrimeTime 24 and its distributors such as EchoStar have grossly violated the limitations imposed by the Copyright Act. Here are some of the Court's findings:

- "There are a variety of reasons, unrelated to being an 'unserved household,' why a customer might sign up for PrimeTime 24." (May 13 Order at 20.)
- "Plaintiffs' evidence indicates that PrimeTime 24 is broadcasting copyrighted network programming to hundreds of thousands of

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32/ Broadcasters reached a settlement several months ago with two other satellite carriers, Primestar and Netlink. The agreement uses Longley-Rice maps to establish presumptively served ("red light") and presumptively unserved ("green light") areas. Those presumptions can be overridden by actual test results.

subscribers who receive a signal of grade B intensity as defined by Congress." (May 13 Order at 29)

- "Th[e] evidence demonstrates that PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it." (May 13 Order at 29.)
- "PrimeTime 24 cannot create its own definition of the term 'unserved household' and then supply its services to anyone who fits within that definition." (May 13 Order at 30 n.14.)
- "[A] company cannot build a business on infringements and then argue that enforcing the law will cripple that business." (May 13 Order at 33.)

Second, in a case against PrimeTime 24, brought by ABC, Inc. in North Carolina over retransmission of ABC programming in the Raleigh-Durham area, the Court granted ABC's motion for summary judgment. The Court found that "no reasonable fact finder could fail to find that PrimeTime's actions constitute a pattern and practice of statutory violation. Although PrimeTime has over 11,000 subscribers in the Raleigh-Durham market, it can show that of these only five meet SHVA's criteria for eligibility." ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d at 477. The Court pointed out that even after the lawsuit was filed, PrimeTime 24 signed up more than 200 new subscribers in towns less than seven miles from the local ABC station's broadcast tower. Id. at 25-26.

Satellite companies have marketed network signals illegally not as a charitable enterprise -- as their comments imply -- but as a highly profitable, unlawful business. DirecTV and NRTC, for example, sell their PrimeTime 24 network package for $6.67 per month, see DirecTV Web site, www.directv.com, but owe copyright fees of only about $2.16 per subscriber per month. Across their many millions of illegal customers, that leaves millions of dollars in

illegal profits each month for the satellite industry -- all from copyrighted product that they have nothing to do with creating.

As below, selling network signals to ineligible subscribers also enables satellite companies to enjoy a major (albeit unlawful) competitive advantage over cable companies: the ability to offer out-of-town network stations, with a wide variety of corresponding benefits that have nothing to do with being an unserved household. (The Commission's own network nonduplication rules prevent cable systems from offering a similarly damaging service.)

VIII. The Satellite Industry Has Aggressively Marketed Distant Network Signals to Ineligible Households As a Way to Enjoy Unlawful Benefits

For the Commission to understand the satellite marketplace, it is vital to appreciate that there are many reasons, completely unrelated to being an unserved household, why viewers choose to purchase network programming by satellite:

1. Time-shifting. Because of time zone differences, satellite subscribers can watch network programs at times different than their local broadcasts. For example, West Coast viewers can watch "N.Y.P.D. Blue," "Everybody Loves Raymond," "Ally McBeal," or "ER" three hours early by watching an Eastern Time Zone station. Similarly, viewers from the Rockies to the Atlantic can watch programs one or more hours later by watching the West Coast stations. In print advertising directed to dish owners, satellite companies actively promote use of their service as a way to time-shift network programming. See PrimeTime 24 print advertisements: "Everyone Watches Television. Some People Watch

When They Choose."; "How Can You Watch *Frasier* and *Home Improvement* in the Same Night?".

2. Out-of-town sports. Because television networks often show different sports events (such as NFL football) in different cities, a subscription to an out-of-town network station enables viewers to see sports events that are not televised locally. Again, the satellite industry actively promotes this benefit. See PrimeTime 24 advertisements: "All the Football You Need is on PrimeTime 24"; "The Big Bad Bears Are Back *Now on Fox* and PrimeTime 24's Got 'Em!".

3. Different syndicated and local programming. A subscription to an out-of-town network station makes it possible for viewers to view syndicated programming that is not available locally or is available at different times locally.

4. Ability to view network programming without acquiring or maintaining an over-the air antenna. Although rooftop antennas are not costly, installation and maintenance of an over-the-air antenna requires a degree of money and effort. A subscription to an out-of-town network package makes it possible to view ABC, CBS, Fox, and NBC programming without the need to make any investments of money or time in acquiring or maintaining an over-the-air antenna.

5. Digital delivery. Unlike broadcast stations (which today deliver programming in an analog format), small-dish programming providers such as DirecTV and EchoStar deliver programming in a digital format. The satellite industry actively promotes this

benefit -- which, again, has nothing to do with living in an "unserved household." See PrimeTime 24 Advertisement: "Sit back and enjoy your favorite network shows with the amazing digital clarity which the [DirecTV] system brings."

IX. The Satellite Home Viewer Act Is *Not* Intended to Maximize Competition by Satellite With Cable; Indeed, It Generally *Prohibits* Satellite Companies From Competing With Cable in Offering Retransmitted Network Programs

By granting exclusive rights to authors, the Copyright Act serves as the economic engine that drives the creation and distribution of books, films, music, computer programs, and television programs. See Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985). The Copyright Act is not generally designed to promote competition, but instead to limit competition in the marketing of works as to which the owners enjoy exclusive rights. See U.S. Constitution, art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

In short, copyright was never intended to, and never has, served as a mechanism to promote competition. It would be an extraordinary error for a federal agency charged with enforcing the Communications Act to (mis)interpret the Copyright Act in that way.

The Satellite Home Viewer Act modifies the traditional copyright regime only slightly: it creates a special device to help make network programming available to a small number of rural households far from local TV towers, while rigorously protecting the rights of broadcaster/copyright owners by limiting that special device to a tiny and narrowly defined group of customers. Congress did not enact the SHVA to maximize competition between cable and satellite, and it would be rewriting history -- and the Act -- to pretend that it did.[33/]

To the contrary, Congress recognized that there is a critical difference between cable and satellite: cable systems generally deliver only local network affiliates, while satellite carriers generally deliver distant network stations.[34/] Because Congress sought to encourage reception of local network affiliates, it forbade satellite carriers to compete with cable in delivering network programming to homes that had recently subscribed to cable. 17 U.S.C. § 119(d)(10)(B). Congress' reason for doing so was to foster localism by deterring viewers from canceling cable service (which provides local stations) in favor of satellite service (which typically does not).[35/]

33/ Moreover, it is difficult to fathom the claim that allowing satellite carriers to deliver distant signals willy-nilly will help them to compete with cable. What the satellite industry has repeatedly said is that some customers turn away from satellite because they want local signals included as part of the package. Only a local-to-local statute -- not a misreading of the narrow existing compulsory license for unserved households -- can address any legitimate competitive concern of the satellite industry.

34/ We urge the Commission to support appropriate local-to-local legislation to make it possible for satellite carriers lawfully to deliver local television stations to their local viewers.

35/ See H.R. Rep. 100-887, pt. 1, at 27 (1988) ("The purpose of the [90-day-no-cable] requirement is to ensure that households will not cancel their cable subscriptions in order to qualify as 'unserved households' eligible to receive a network station [by satellite]."). The "90-

Moreover, when Congress passed the SHVA in 1988, and renewed it in 1994, it was well aware of the existing cable compulsory license in Section 111 of the Copyright Act. Had Congress wished to create a compulsory license for satellite companies identical to that applicable to cable systems, it certainly knew how to do so. Indeed, in the 1994 amendments to the Copyright Act, which altered both the cable and satellite compulsory licenses, Congress did bring another competitor to cable -- MMDS, or "wireless cable" -- within the Section 111 compulsory license. Nevertheless, Congress again chose to maintain a separate licensing regime for satellite in Section 119.

In short, far from seeking to treat satellite and cable identically with regard to retransmission of network stations, Congress expressly designated cable in Section 119 as the preferred delivery system because cable protects localism by delivering *local* stations. There could hardly be a clearer indication that -- contrary to the misleading claims made by the satellite industry -- SHVA is not intended to maximize competition between satellite and cable in the retransmission of broadcast signals, and particularly not competition through blatant copyright infringement.

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day-no-cable" provision of the SHVA as enacted was the successor to a provision that would have treated any household as "unserved" if it "can[] reasonably receive the signal of [the] television network by cale television." See Copyright Office Report, Appendix II, at 581 (prior version of bill).

X. Pertinent Judicial Interpretations

The Commission now has the benefit of several federal court decisions interpreting and applying the SHVA. These decisions establish a number of key points:

A. Objective standard

Both the CBS Court in Miami and the ABC in North Carolina have confirmed that "Grade B intensity" in Section 119 is an objective signal strength standard, which incorporates the specific signal strengths (such as 47 dBu for low-VHF channels) specified in the Commission's rules at 47 C.F.R. § 73.683(a). See CBS Inc. v. PrimeTime 24, 9 F. Supp.2d 1333, 1340 n.8 (S.D. Fla. 1998); ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d 467, 472 (M.D.N.C. 1998).

B. Burden of proof on the satellite carrier

Both courts have likewise confirmed what is evident from the text of the statute: the Act requires satellite carriers -- not broadcasters -- to bear the burden of proving that each of their customers in incapable of receiving signals of Grade B intensity from local stations. See 17 U.S.C. § 119(a)(5)(D) (1998); CBS Inc. v. PrimeTime 24, 9 F. Supp.2d at 1340; ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d at 474.

C. Only actual tests can be used to meet the burden of proof.

As the ABC, Inc. court has held, to meet its burden of proof that a particular household is unserved, a satellite carrier must conduct a signal intensity test at each subscriber's home. See ABC, Inc. v. PrimeTime 24, 17 F.Supp.2d at 473-74. Congress clearly contemplated that satellite carriers would in fact carry out such site measurements. See H.R. Rep. 103-703, at 13 ("[Grade B intensity] is an objective test accomplished by actual measurement.") (emphasis added); S. Rep. 103-407, at 9 (1994) ("This objective test [Grade B intensity] can be accomplished by actual measurement.") (emphasis added).

In the Miami case, the Court bent over backwards to allow PrimeTime 24 to serve subscribers that it had not tested and as to which it had therefore not met its burden of proof. Specifically, in fashioning a preliminary injunction, the Court permitted PrimeTime 24 to deliver network programming to any household predicted by Longley-Rice (run in the standard manner) not to receive a signal of Grade B intensity, provided that the household meets the other applicable legal requirements. July 10 Supplemental Order, ¶ 3.[36/]

[36/] Of course, if a station tested such a household and showed that it does receive a signal of Grade B intensity, the carrier would be required to terminate service to that household.

D. Congress' decision to incorporate the "Grade B" signal strengths specified by the FCC

Both the CBS and ABC courts agree that to achieve its intentions in 1988, Congress reached out and borrowed the signal strengths specified in Section 73.683(a) of the Commission's rules:

> Although Section 73.683 concededly was drafted with other purposes in mind, Congress can clearly adopt by reference, in whole or in part, any portion of the Code of Federal Regulations which it considers relevant to defining a new statutory term. It is apparent that Congress has done so here. SHVA's reference to "an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)" most naturally refers to the dBu's required for a signal of Grade B strength for each particular channel.

ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d at 472.

XI. The Miami and Raleigh Courts Have Thus Far Issued Different Forms of Relief Because the SHVA Specifically Authorizes Two Alternative Remedies

EchoStar has repeatedly contended that there is some inconsistency in the fact that the Miami and Raleigh courts have granted somewhat different forms of relief, one (Miami) relying on Longley-Rice maps as an initial determinant of eligibility, and one simply barring the defendant from any transmissions of ABC programming within a certain geographic area. See also NPRM, ¶ 8. But the different forms of relief granted by the two courts simply reflect the

fact that the Copyright Act offers plaintiffs a choice of seeking relief for "individual violations" or for a "pattern or practice" of violations. Compare 17 U.S.C. § 119(a)(5)(A) (1998) (individual violations) with 17 U.S.C. § 119(a)(5)(B) (1998) (pattern or practice).

In the Miami litigation, the plaintiffs asked the Court, in the context of a preliminary injunction, to grant relief only under the "individual violations" provision of the SHVA, 17 U.S.C. § 119(a)(5)(A) (1998). The Court therefore used its discretion to tailor a form of relief that permits the defendant to continue to provide network programming to certain households -- even though PrimeTime 24 has engaged in egregious violations of the Copyright Act, and even though it has not met its burden of proof by testing the signal intensity at those households.[37] Specifically, the Court relied on the Commission's own established protocol for running the Longley-Rice terrain-sensitive propagation model.

In the Raleigh litigation, by contrast, the plaintiff sought -- and has been granted -- relief under the "pattern or practice" provisions of the SHVA. When a Court finds that a satellite carrier has engaged in a pattern or practice of violations, it must prohibit the satellite carrier from engaging in any further retransmissions of the network programming in question (e.g., ABC programming) within the area in which the pattern or practice has occurred. 17 U.S.C. § 119(a)(5)(B) (1998). When a satellite carrier has committed a pattern or practice of

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[37] The CBS court also permits PrimeTime 24 to serve any household that cannot receive a signal of Grade B intensity, even if Longley-Rice predicts that the household is served. All PrimeTime 24 needs to do is perform a signal intensity test in the manner specified by the Court; if the test shows that the household cannot receive a signal of Grade B intensity, PrimeTime 24 is free to deliver network programming to that household. See July 10 Supplemental Order, ¶ 3.

violations in a local area, the Court must order the satellite carrier to cease delivering the network in question within the station's local market, which means the station's FCC-predicted Grade B contour.[38/]

In the Raleigh case, the Court found that PrimeTime 24 had indeed engaged in a pattern or practice of violating the Satellite Home Viewer Act. As a result, the Raleigh court has, as the Act requires, prohibited PrimeTime 24 from distributing ABC programming anywhere within the Grade B contour of the ABC station in question, WTVD. See ABC, Inc. v. PrimeTime 24, 17 F. Supp.2d 478, 490 (M.D.N.C. 1998).

There is thus nothing at all inconsistent about the Miami and Raleigh decisions, each of which faithfully implements the requirements of the Copyright Act.

XII. The Satellite Industry Has Thrived Since Being Required To Comply with the SHVA in Signing Up New Subscribers, and is Finding Lawful Ways to Provide Network Affiliates

If complying with the SHVA as written were a serious competitive burden for the satellite industry, PrimeTime 24 distributors such as DirecTV should have seen a sharp decline in their new signups starting in August 1998, the first full month that PrimeTime 24 distributors such as DirecTV were enjoined from signing up new, ineligible subscribers for CBS and Fox. In fact, DirecTV signups have broken all past records during the time it has been required to

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38/ See Satellite Home Viewer Act of 1994 H.R. Rep. 103-703, at 15 (1994) ("[F]or purposes of establishing a pattern or practice violation carried out on a local basis under § 119(a)(5)(B), the only relevant area is the network station's predicted Grade B contour.").

comply with the preliminary injunction.[39] Even if the SHVA were intended to promote competition with cable -- which it emphatically is not -- there would be no need to bend the rules for the satellite industry to prosper and offer robust competition to cable.[40]

In an article published only a few days ago, the Wall Street Journal described how the satellite industry is thriving even while being required to comply with the SHVA:

> Thanks to improvements in technology, and some help from big regional telephone companies, DBS operators are now in a position to offer local TV broadcasts. And now, the satellite-TV industry thinks it can finally become a more serious rival to cable. . . .

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[39] Digital TV Bites into Hughes, Electronics Times (Oct. 19, 1998) ("DirecTV helped boost Hughes' company-wide sales by 20% . . . with US subscriber figures showing record growth as they broke through the four million mark."); Hughes Flying High on Satellite Services, The Financial Post (Oct. 13, 1998) ("Revenue rose more than 20% to US$ 1.5 billion from US$ 1.25 billion, driven mainly by continued record subscriber growth for DirecTV in the U.S."); Hell Week: SkyFORUM Kicks Off NYC-Fest With Look at Competition, Cablefax (Sept. 15, 1998) (describing "widespread reports of record DTH [direct-to-home] subscriber growth". . . [Subscribers] are running 21% ahead of '97 in month-to-month comparisons."); Dog Days Sit Up for DirecTV, Broadcasting & Cable (Sept. 14, 1998) ("DirecTV, the nation's largest DBS provider, set a record for August subscriber growth, adding 101,000 new customers to bring its total to just under 4 million. DirecTV added 87,000 subs in August 1997"); www.dbsdish.com/dbsdata.html (visited Dec. 8, 1998) (DirecTV added 226,781 net new customers during October/November 1998, compared to 171,538 during comparable period in 1997); DirecTV Activates 4 Millionth Subscriber, http://www.directv.com/news/4million.html (December 8, 1998) ("Accelerated growth continues with year-to-date subscriber acquisition up nearly 30 percent from last year.") (emphasis added in all cases).

[40] According to a Wall Street industry analyst, "[w]ith roughly 10.5 percent of all U.S. households subscribing to satellite TV, it seems to have reached the critical mass that allows word of mouth to be a major selling source." Satellite News, EchoStar's Purchase of Prime Slots Threatens Rival DBS Providers (Dec. 7, 1998).

Now, DBS services, working with telephone companies, are simply adding a separate advanced antenna to their satellite package. They give customers the local channels they want — but not by satellite.

. . . .

Earlier this year, two big DBS operators — Hughes Electronics Corp.'s DirecTV unit, based in El Segundo, Calif., and U.S. Satellite Broadcasting Co., St. Paul, Minn.— signed co-marketing deals with big regional phone companies, including Bell Atlantic Corp. and GTE Corp. The phone companies have started selling satellite TV as part of a package of phone, video and high-speed data services.

Armies of door-to-door sales representatives are singing DBS's praises and offering turnkey satellite services, including powerful new antennae capable of tapping local TV channels with the mere zap of a remote control. "All you do is sit in your easy chair, hit the button, and you're off to the races," says Richard Belville, president of Bell Atlantic's video unit.

Gail Neumann, a retired bookkeeper in Hillsborough, N.J., dumped her longtime cable-TV company about a month ago after signing up with DirecTV through Bell Atlantic. She has ordered the works for around $55 a month — about what she used to pay for her old cable service — and says she hasn't looked back. "There are like a million things on," she says. "About the biggest decision I have is what to watch."

> Mrs. Neumann says all the new channels give her more value for her money. Plus, she says, her TV reception, which had been hit-or-miss with cable, has improved substantially with satellite. "I'm crazy about it," she says.
>
> Greg Lewis, a Falls Church, Va., automotive mechanic, is another convert. He signed up for DirecTV service about a month ago, after getting a good look at it while visiting his brother, who is a Bell Atlantic employee. Mr. Lewis says local TV channels come in "just as good if not better" as they did before, and reception on other channels is a lot sharper. He is also paying about $15 a month less than he did for cable. "That's the icing on the cake," he says.
>
> The local antennae are entirely legal. Deborah Lathen, head of the Federal Communications Commission's cable bureau, says the new DBS offerings benefit the consumer and promote competition.[41/]

At the same time, EchoStar has announced a major deal with News Corporation that will give EchoStar a huge new amount of satellite capacity, which will enable it (once an appropriate legal regime has been set) to provide local-to-local satellite service to a large percentage of American television households.[42/] These developments show that the marketplace

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41/ Wall Street Journal, Satellite TV Uses Antennae to Fight Cable Brethren (Dec. 1, 1998).

42/ With New Slots, EchoStar Eyes 500 Channels, Multichannel Online News, www.multichannel.com/10.shtml (Dec. 7, 1998) ("EchoStar will now go forward with its ambitious plans, which include providing local-to-local channels to about 50 percent of the country . . . ."); Cable World, www.mediacentral.com/magazines/cableworld/news98/1998120701.htm/539128, (Dec. 1098) ("EchoStar executives say the pact would permit their company to offer 500 channels to consumers by early 2000, including . . . local broadcast

will find legitimate, win-win solutions to the problem of delivering network stations to satellite dish owners -- without any need to "interpret" the SHVA in ways that defeat the intent of Congress and reward scofflaws.

CONCLUSION

Localism is the bedrock principle on which the system of free over-the-air television -- a system that has served this country well for half a century -- has been built. As Congress and the Commission have consistently recognized, an essential economic basis of localism is the network-affiliate system, through which local stations deliver network programming to local viewers, and local stations are protected from invasion of their markets by the same network programming brought in from distant markets.

Proposals in this proceeding to change the definition of Grade B intensity would undermine both localism and the network-affiliate system. The Commission, for purposes of the SHVA, cannot and should not, change that definition.

Jury-rigging the methodology for testing signal strength intensity could likewise seriously impair localism and the network-affiliate system. Such proposals violate both sound engineering principles and the language and intent of the SHVA, and should be rejected.

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stations.").

To the extent the Commission chooses to adopt any suggested prediction methodology, it should endorse the same Longley-Rice model relied upon in the digital allocation proceeding.

While the need to create real and viable competition to cable is legitimate; copyright in general, and the SHVA in particular, is not the legal or appropriate means to achieve that goal. The ultimate solution to the white area problem is a combination of (a) improving and distributing the proper antennas to receive local signals and (b) new legislation authorizing the satellite delivery of local stations into their local markets. NAB advocates, and the Commission should endorse, both.

Respectfully submitted,

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